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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 690

UNITED STATES OF AMERICA, PETITIONER

v.

LUCIEN W. ROLLAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (R. 274) reversing the judgment on conviction and directing a judgment of acquittal.

OPINION BELOW

The opinion of the Court of Appeals (R. 269–273) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 274). A petition for rehearing was denied on March 2, 1953 (R. 279). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a prosecution of respondent under the false statements act, 18 U. S. C. 1001, for having knowingly and wilfully made false statements to the Wage and Hour Division in connection with an investigation of his business to determine if it was covered by the Fair Labor Standards Act and if he was complying therewith, it was necessary to allege and show that the employees concerned were covered by the Act or that the employer had not paid wages due his employees.

2. Whether the indictment was defective in failing to allege that the information contained in the false statements and documents was material, where the facts alleged clearly showed that the information was material to the authorized investigation.

3. Whether the evidence was sufficient to sustain the conviction under count one.

STATUTE INVOLVED

18 U. S. C. [1948 rev.] 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing

the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 20, 1949, a four-count indictment was filed in the United States District Court for the Eastern District of Louisiana charging respondent and his daughter and son-in-law with violations of 18 U. S. C. 1001 (R. 2–5). The first count charged (R. 2):

> That on or about the 13th day of January 1949, in New Orleans, Louisiana, in the New Orleans Division of the Eastern District of Louisiana, the defendants Lucien W. Rolland, Robert L. Pierpoint, and Celena R. Pierpoint knowingly and wilfully made and used a false document in writing knowing the same to contain a false, fictitious and fraudulent statement in a matter within the jurisdiction of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor, an agency of the United States, in that said defendants made and furnished the said Wage and Hour and Public Contracts Divisions a statement setting forth that the said defendant Lucien W. Rolland, doing business as Rolland Safe & Lock Company and Rolland for Keys had paid William R. Ward, one of the said defendant Lucien W. Rolland's employees, the

> sum of $94.47, which said sum had been determined by the said Wage and Hour and Public Contracts Divisions to be due to the said employee as overtime compensation under the Fair Labor Standards Act of 1938, when in truth and in fact, as the aforesaid defendants well knew, payment of said sum as reflected by said statement had not been made.

Counts II and III were like Count I except that they related to different employees (Marion Noustens and Herman C. Alonzo) and sums of money (R. 3–4). In substantially the same language, Count IV charged the three defendants with orally repeating the representations alleged in Counts I–III to the Wage and Hour and Public Contract Divisions on February 3, 1949 (R. 4–5).

The evidence adduced at the trial disclosed that respondent owned and operated a business at New Orleans, Louisiana, known as the "Rolland Safe and Lock Co." and "Rolland for Keys" (R. 49). The business was engaged in the sale, installation, repair and rebuilding of locks, safes and keys (R. 19). A portion of its work was done for ships, ship chandlers, industrial consumers and other establishments engaged in interstate commerce, and some sales were to Mississippi and Texas (R. 19–20).

On June 21 and 23, 1948, an investigator for the Wage and Hour and Public Contracts Divi-

sions of the United States Department of Labor, Kenneth G. Schwartz, made an investigation of respondent's business to determine whether his employees or any of them were covered by the federal Wage and Hour law and, if so, whether they were being paid in accordance therewith (R. 17–21). From an examination of respondent's records and interviews with respondent's employees, the investigator concluded that respondent's employees were covered by the act and were not being paid in accordance therewith (R. 21). Some were not paid the minimum wage of 40¢ per hour and none had been paid time and one-half for overtime (R. 21).

At the conclusion of the investigation, the investigator discussed his findings with respondent (R. 22.) Respondent, who had thought his employees were not covered by the act, agreed to comply with it immediately (R. 23). He also agreed to compute and pay the unpaid minimum wage and overtime wage to the covered employees for the period of liability, *i. e.*, from May 14, 1947 to June 24, 1948 (R. 23).

The investigator left computation sheets and instructions for computing the unpaid wages with the defendant Robert Pierpoint, respondent's office manager and son-in-law (R. 23, 25). Three or four weeks later the investigator went to respondent's place of business where he was given the completed computations. He found them to

be substantially accurate and approved the payments indicated by providing respondent with Government form F. O. 56 (R. 23), the official form which the Wage and Hour Division permits employers to use to correct an honest mistake (R. 24).

The investigator had typed on this form the names of the employees and the amounts due to each of them based upon the computations submitted by respondent (R. 40). The investigator advised respondent, in the presence of Mr. Pierpoint, to have each employee affix his signature on the form immediately above his typewritten name as evidence of receipt of payment of the amount listed (R. 25–26). The form had written on its face the statement: "The signature of an employee affixed hereto constitutes a receipt for such unpaid wages" (R. 153). The investigator told respondent that, when the payments were made and the form returned, he would recommend that the case be closed (R. 26).

Two or three weeks later the investigator contacted Mr. Pierpoint on two or three occasions inquiring as to why the receipts had not been forwarded to the Wage and Hour office. After he was unable to obtain any satisfaction from Mr. Pierpoint or respondent, he turned the case over to his supervisor. (R. 26.) In subsequent consultation with the supervisor, respondent was told that any payments made under the supervision of the Wage and Hour Division would have to

be in full, that the official receipt, form F. O. 56, could not be used in the event a compromise was attempted, and that each employee should be required to affix his signature to the receipt at the time payment of the full amount indicated was made (R. 62–63).

On January 13, 1949, the form F. O. 56, previously left with respondent was received through the mails at the Field Office of the United States Department of Labor, with the signatures of employees affixed thereto (R. 27, 41, 78).

As was the usual practice, forms were mailed to some of the employees inquiring as to whether they had actually been paid (R. 27–28). No response was obtained from one employee, and two others stated that they had each been paid only $25, a much smaller amount than that indicated on the form F. O. 56 (R. 27–28).

In the early part of February 1949, two investigators again visited respondent's office (R. 27–29, 57–61). Respondent was told that the investigators had evidence which indicated that some of the employees might not have received the full amount shown on the form F. O. 56. They showed respondent the form which had been received and asked him if he was certain that the employees who had affixed their signatures thereto had been paid in full. He replied that they had definitely received the amount shown on the form (R. 29).

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When the investigators stated that if the amounts shown on the form had not been paid it would be a serious matter, and suggested that something may have transpired of which respondent was unaware, respondent vigorously asserted that the employees had been paid the full amounts shown on the form, and that he had cancelled payroll checks to prove that the full amounts had been paid (R. 29–30, 42, 59). He offered to get the cancelled checks from the bank and show them to the investigators, stating that "he was too good a business man to try anything like that" (R. 30, 59).

After telephoning the bank, it was agreed that respondent would obtain the cancelled checks and the investigators would come back the next day to look at them. An investigator also asked respondent to call him if he found out that something had happened of which he was not aware (R. 30). The investigator returned the following day and examined the cancelled checks, which respondent made available to him, which were for the full amounts shown on the form F. O. 56 (R. 30).

At no time during this conference did respondent, or the other two defendants who were also present but did not participate in the discussion (R. 60–61), deny mailing the form to the Government agency. Instead respondent maintained in

the strongest terms that it was accurate and he could and would prove it. (R. 42, 59.) [1]

Ward, who was the employee involved in Count I and one of those in Count IV, testified that he signed the form in respondent's office in the presence of all the defendants, that he did not recall whether the amount of $94.47, which appears opposite his name on the form, was there when he signed, and that he was offered $25, which he understood to be the full amount due, but turned it down (R. 83–88). He said that some weeks later he was paid in full (R. 84–89).

The second employee, Mrs. Marion Noustens Philippi, involved in Counts II and IV, testified that she signed the form and a blank payroll check in the presence of Mrs. Pierpoint, at which time she was given to understand that she was entitled to only $25, which amount she was paid in cash (R. 95–99). After the grand jury proceedings, she was paid the remainder of the $84 due her (R. 96, 100).

The third employee, Alonzo, involved in Counts III and IV, testified that he signed the form and

[1] The investigator's testimony regarding the above conference was undisputed. Respondent did not testify, and nothing in the testimony of the other two defendants denied the investigator's account of the conference. They claimed that the employees signed the form with the understanding that they would later be paid the full amount when the firm was able to do so, and that checks were made out for the full amounts, and the employees' endorsements obtained on them, simply for record purposes (R. 153–154, 161–163, 203–205).

endorsed the back of a check without seeing the front, with the understanding that respondent would cancel a $25 debt which he owed respondent (R. 108, 115–116, 118). He did not know and was not told how much money was due him (R. 115–116, 118). He did not remember whether respondent was present, but Mr. Pierpoint was (R. 109, 115). About four months later he was paid the entire amount (R. 123), which he believed was "$106 some odd" (R. 120).

There was also evidence (R. 18–22, 45–50, 94, 138–139, 144–145, 179, 212–213) as to whether the employees involved were covered by the Federal Wage and Hour law, and this question was submitted to the jury (R. 237–239). This was done because the Fifth Circuit had held in *United States* v. *Moore,* 185 F. 2d 92, that "coverage" was an element of an offense under section 1001. (See *infra,* pp. 11–12.)

Respondent was convicted on Counts I and IV, Mrs. Pierpoint on Counts II and IV, and Mr. Pierpoint on Counts III and IV (R. 250). Respondent was sentenced to imprisonment for one year and a day on Count I and to pay a fine of $500 on Count IV (R. 261–262).

On respondent's appeal, all three judges of the Court of Appeals for the Fifth Circuit held that all counts of the indictment were defective because they failed to allege that the misrepresented facts were material. To have properly

alleged materiality, the court held, the indictment should have alleged, either directly or indirectly, (1) that the employees concerned were covered by the Federal Wage and Hour law, and (2) that the amounts which the defendants represented that they had paid the employees were actually due them (R. 272).[2] Two judges also held that the Government had failed to prove these facts. In addition, these judges held that the evidence was insufficient to sustain respondent's conviction on Count I because it did not "establish beyond a reasonable doubt that [respondent] made the form [form F. O. 56] or furnished it to the Wage and Hour Division" (R. 272). Accordingly, the court directed a judgment of acquittal (R. 273).

The court premised its discussion upon its prior decision in *United States* v. *Moore,* 185 F. 2d 92, which held that in a proceeding for false statements to the Wage and Hour Division under Section 1001 (then 18 U. S. C. (1946) Sec. 80) the Government must prove that the defendant employer was subject to the Fair Labor Standards Act. This decision was based not only on the statutory requirement that the concealment

[2] The court thought that the allegation that the sums misrepresented had been determined by the Wage and Hour Division to be due was not the equivalent of an allegation that the sums were actually due (R. 272). But this allegation was certainly sufficient to show the materiality of the misstatements in an investigation under the Fair Labor Standards Act, even though determinations by the Wage and Hour Division are not conclusive as a matter of law.

be "in any matter within the jurisdiction of any department or agency of the United States", but upon the requirement as to materiality where the offense consists, as it did in the *Moore* case, of the concealment of a material fact, an act prohibited by the first clause of the false statement statute.

The *Moore* case sustained the sufficiency of the indictment, which alleged the materiality of the facts concealed.[3] Although the indictment herein rested upon the second and third clauses of the statute—which do not require that the falsehood be as to a material fact, but prohibit the making of "a false, fictitious and fraudulent statement" (Count Four), or making or using "a false document in writing knowing the same to contain a false, fictitious and fraudulent statement" (Count One)—the court found the indictment in the instant case insufficient because it did not allege materiality in the respects described in the second preceding paragraph, *i. e.,* coverage and violation.

On petition for rehearing the Government argued, *inter alia,* (1) that it was unnecessary for an indictment under the second and third clauses of section 1001, *supra,* pp. 2–3, to allege that the misrepresented facts were material (R. 275–276), (2) that it was unnecessary to allege or show that

[3] Since it prevailed on this ground, the Government could not seek certiorari, even though it deemed the court's reasoning erroneous for the reasons set forth in this petition.

the employees concerned were covered by the federal Wage and Hour law, (3) that it was sufficient that the investigation was authorized by the Wage and Hour law, and (4) that the allegedly misrepresented facts were patently material to the investigation (R. 276–277). The petition for rehearing was denied (R. 279).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in holding—

(1) that coverage under the Fair Labor Standards Act must be alleged and proved in a prosecution under 18 USC § 1001 for making false statements to the Wage and Hour Division;

(2) that allegations and proof that the wages required to be paid under the Fair Labor Standards Act were actually due, *i. e.*, that the Fair Labor Standards Act had been violated, are prerequisites to a prosecution under section 1001;

(3) that in prosecutions under the second and third clauses of section 1001, the Government must allege and prove misstatements as to a material fact, even though only the first clause makes this a condition of the offense;

(4) that allegations and proof as to the matters described in Specifications 1 and 2 are essential to a showing of the materiality of the misrepresentation;

(5) that the allegations and evidence were insufficient to show materiality in the instant case;

(6) that there was insufficient evidence to sustain the conviction under Count One of the indictment;

(7) that there was insufficient evidence of interstate commerce.

REASONS FOR GRANTING THE WRIT

1. Although the opinion below is couched in terms of the failure of the Government to allege or prove that the false statements were material, it is clear, particularly when the decision is read in the light of the *Moore* case, that the substance of the holding is that the false statements statute does not apply to false statements deliberately made to the Wage and Hour Division unless the Government alleges and proves both that the employment is covered by the Act and (when the statements relate to wages due) that the employer has not paid the amounts required. This means that an employer can make false statements to investigating agents with impunity unless the Government subsequently proves not only the fraud but that he is subject to the Act and apparently also in violation.

The object of the investigations authorized by Section 11 (a) of the Fair Labor Standards Act[4]—as well as under many other statutes—is

[4] 52 Stat. 1066; 29 U. S. C. 211 (a): "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this

to gather information from which the facts of coverage and violation may be determined. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 210. The Wage and Hour Division was plainly given jurisdiction to investigate no matter how the inquiry turned out.[5] The governmental process of obtaining information as to coverage and violation was not meant to be frustrated by frauds which would be unpunishable unless coverage and violation were subsequently shown.

In setting aside the conviction herein, the decision below has departed from principles laid down by this Court in situations in which the jurisdiction of the defrauded agency was much more shadowy than here. *United States* v. *Kapp,* 302 U. S. 214; *Kay* v. *United States,* 303 U. S. 1. In addition, the decision conflicts with decisions of the Second Circuit which have interpreted the false statements statute as applying to any de-

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Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

[5] In the instant case, there was evidence that the respondent-employer was subject to the Act (R. 18–20), and the jury, under the charge, must have so found. The court below did not deny that the business was subject to the Act, but thought the evidence insufficient as to Ward (R. 272). This proves that the Wage and Hour Division had jurisdiction to undertake the investigation, whether or not all of respondent's employees turned out to be actually covered.

liberate attempt to mislead a government agency acting within the color of its authority. *United States* v. *Meyer,* 140 F. 2d 652 (C. A. 2); *United States* v. *Barra,* 149 F. 2d 489 (C. A. 2).

In the *Kapp* case, this Court held that it was a violation of former Section 80 to make false statements to the Secretary of Agriculture for the purpose of securing payments under the Agriculture Adjustment Act, even though that act had subsequently been declared unconstitutional. The Court said (302 U. S. at 218) "It is cheating the Government at which [section 80] aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government."

In the *Kay* case, this principle was extended, as to a false statements provision in the Home Owners' Loan Act, to "false statements designed to mislead those acting under authority of the Government" (303 U. S. at 7), where there was no attempt to cheat the Government of money. Again the Court said that such persons had no standing to assert that the substantive statutory provisions to which the penal provision was attached were unconstitutional (p. 6). Irrespective of the validity of the Act, "Congress was entitled to secure protection against false and misleading representations" (p. 7).

If false statements made in relation to a demand under an unconstitutional statute are actionable, the same is *a fortiori* true as to false statements made under a valid statute which may turn out to be inapplicable in the particular case.

The Second Circuit cases, like the *Kapp* case, were brought under Section 80, the predecessor to the provision here involved, which contained the same language in so far as here pertinent.

In *United States* v. *Meyer,* the defendant contended that the Military Exclusion Board to which he made the false statements was not validly constituted. The Second Circuit held that the "defendant was not in a position to raise the question in this proceeding. * * * As long as a department or agency has colorable authority to do what it is doing, the constitutionality of the statute or order granting the authority in the first place is immaterial" (140 F. 2d at 655). In *United States* v. *Barra,* in answer to a claim that an agency was acting beyond its authority in requiring certain statements, the Second Circuit held that "once it appears that the department 'has colorable authority to do what it is doing', an accused under [section 80] cannot justify his falsehood by a collateral attack upon the authority" (149 F. 2d at 490).

The instant case is even stronger than those cases where the governmental action which elicited the false statements was invalid because beyond

the agency's authority. For section 11 (a) of the Fair Labor Standards Act (quoted in note 4, *supra*, pp. 14–15) gives the Administrator of the Wage and Hour Division authority to "enter and inspect such places and such records * * *, question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any" provision of the Act or "which may aid in the enforcement" thereof. The Administrator thus plainly has jurisdiction to require an employer to furnish information concerning his employees for the purpose of determining the question of coverage even if they are not covered by the federal law, and even more plainly to ascertain whether or not any unpaid overtime is due and whether it is necessary to bring suit to secure compliance. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 210; *Holloway Gravel Co.* v. *McComb,* 174 F. 2d 421 (C. A. 5), certiorari denied, 338 U. S. 823; *In re Standard Dredging Corp.,* 44 F. Supp. 601 (S. D. N. Y.), affirmed *sub nom. Walling* v. *Standard Dredging Corp.,* 132 F. 2d 322 (C. A. 2), certiorari denied, 319 U. S. 761; *Walling* v. *American Roebal Corp.,* 135 F. 2d 1003 (C. A. 2). Thus respondent made the false statements and furnished the false documents in a "matter within

the jurisdiction"[6] of the Wage and Hour Division. This is all that is required in order to make Section 1001 applicable.[7]

The Fifth Circuit's departure from the principles approved by this Court and the Second Circuit will not only hamper the enforcement of the Fair Labor Standards Act, but also the application of Section 1001 to many other agencies.

2. The indictment was not defective in failing to allege that the false statements were material. The false statements and documents clauses, unlike the concealment clause, of Section 1001, does not require that the misrepresented facts be material. The indictment was in the language of the statute, and clearly apprised respondent of the charges against him. *Hagner* v. *United States,* 285 U. S. 427; *Potter* v. *United States,* 155 U. S. 438, 444; *Ledbetter* v. *United States,* 170 U. S. 606, 609–610.

[6] The term "jurisdiction" as used in section 1001 means the power to act or deal with the subject matter about which the false statements were made. *United States* v. *White*, 69 F. Supp. 562, 564 (S. D. Calif.); *United States* v. *Sanders*, 42 F. Supp. 436, 439 (S. D. Tex.).

[7] In the *Moore* case, the Fifth Circuit based its decision in part upon the contrast between the "severe penalties" for violating section 80 with the milder criminal penalties provided in the Fair Labor Standards Act. (185 F. 2d at 95.) An identical argument, based upon the comparable provisions of the "Hot Oil" Act, was made and rejected in *United States* v. *Gilliland*, 312 U. S. 86, 95.

As this Court said in *Kay* v. *United States, supra,* with respect to a prosecution under a similar false statements statute (303 U. S. at 5–6), "It does not lie with one knowingly making false statements with intent to mislead the officials of the [Government] to say that the statements were not influential or the information not important."

But even if the information contained in the false statements and documents must be material, it need only be material to the authorized investigation. The false statements alleged in the indictment as to wages paid to certain employees were, on the face of the indictment, material to an investigation as to coverage and compliance with the Wage and Hour law. Cf. *Todorow* v. *United States,* 173 F. 2d 439 (C. A. 9). Thus, even if materiality is an element of the offense, the indictment sufficiently alleged facts showing that the false information was material.

3. The holding of a majority of the court below that the evidence as to Count One was insufficient because it did not "establish beyond a reasonable doubt that [respondent] made the [form F. O. 56] or furnished it to the Wage and Hour Division" was wholly unwarranted. It is true that the government investigator originally made the document from information furnished him by respondent's company. But at that time it was a true document; it became a false one when

respondent caused the employees to sign as evidence of payments which had not been made. Thus it was respondent who made the document false. See pp. 7–10, *supra*. In any event, it is sufficient under the statute and Count One that respondent *used* the false document. It was left with him, he caused it to be filled out in a manner he knew to be false, it was mailed to the Wage and Hour Division,[8] and when questioned about its accuracy, he vigorously asserted that he knew that it was correct and that the sums had been paid, even presenting the misleading cancelled checks as proof. (See Statement, *supra*, pp. 5–9.) This was more than enough evidence to sustain the finding that he participated in using the false document to mislead the Wage and Hour Division. Cf. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619–620.

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[8] Although there was no direct evidence as to who mailed the letter containing the form, the undisputed testimony that the form had been left by the Wage and Hour Division's representative with respondent, that it was received in the mail by the Wage and Hour Division, and that respondent thereafter insisted upon its truthfulness, without denying that he had mailed it, is plainly enough to show that respondent caused the mailing, and thereby both used the form and furnished it to the Wage and Hour Division.

CONCLUSION

That the false statements statute has been held not to apply to a deliberate attempt to mislead a governmental agency in a matter clearly authorized by statute presents, in itself, an issue important enough to warrant the grant of certiorari in this case. In addition, the decision below cannot be reconciled with decisions of this Court and of the Second Circuit. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

MARCH 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953